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10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 DAEKUN CHO,
aka "DK,"

17 Defendant.
18

No. CR 23-00149-FLA

GOVERNMENT'S EX PARTE APPLICATION
FOR ORDER COMPELLING DEFENDANT TO
PERMIT PHOTOGRAPHING OF TATTOOS;
DECLARATION OF JENA A. MACCABE

19 Plaintiff United States of America, by and through its counsel
20 of record, the United States Attorney for the Central District of
21 California and Assistant United States Attorneys Jena A. MacCabe and
22 Kevin J. Butler, hereby applies ex parte for an order compelling
23 defendant DAEKUN CHO to permit photographs to be taken of any and all
24 tattoos located anywhere on his body.

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1 This application is based upon the attached memorandum of points
2 and authorities, the attached declaration of Jena A. MacCabe, the
3 files and records in this case, and such further evidence and
4 argument as the Court may permit.

5 Dated: March 8, 2024

Respectfully submitted,

6 E. MARTIN ESTRADA
7 United States Attorney

8 MACK E. JENKINS
9 Assistant United States Attorney
 Chief, Criminal Division

10 /s/

11 _____
 JENA A. MACCABE
 KEVIN J. BUTLER
 Assistant United States Attorneys

12 Attorneys for Plaintiff
13 UNITED STATES OF AMERICA
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Defendant DAEKUN CHO ("defendant") is proceeding to trial on
4 March 19, 2024, on charges of Hobbs Act extortion and carjacking. To
5 rebut the anticipated defense that defendant's victims were paying
6 him to protect them, rather than as extortion, the government seeks
7 to introduce evidence of defendant's relationship with the Grape
8 Street Crips ("GSC"). Multiple victim witnesses will testify that
9 they paid him, in part, because defendant told them, or they knew his
10 reputation that, he was involved with GSC. The government's expert
11 witness will also explain how GSC's protection schemes work,
12 including that GSC promises to protect its victims from violent crime
13 so long as the victims make regular payments, but that GSC is
14 essentially just offering to refrain from attacking the victims
15 themselves. He will also testify about how these schemes are
16 successful in part because GSC targets victims who do not trust law
17 enforcement to adequately protect them based on their general
18 distrust of law enforcement, engagement in illegal or unregulated
19 activities themselves, or language and cultural barriers. From this
20 evidence and others, the jury will learn exactly how defendant's
21 extortion scheme worked, why his victims feared him, and where he
22 learned and perfected that scheme from in the first place.

23 Some of the government's witnesses have shared defendant's
24 social media posts broadcasting his relationship with GSC. Law
25 enforcement further believes that defendant may have a GSC tattoo.
26 Through this application, the government respectfully asks the Court
27 to issue an order requiring defendant to permit government agents or
28 Bureau of Prisons ("BOP") staff to take photographs of any of his

1 tattoos. As set forth below, the compelled exhibition of tattoos is
2 non-testimonial, and therefore, defendant has no right to refuse to
3 permit photographs to be taken of his tattoos. Photographs of any
4 GSC tattoos will directly rebut defendant's argument that "[t]here is
5 no evidence that Mr. Cho has any tattoos identifying him as a member
6 of GSC." (Def.'s Mot. in Limine to Exclude Evid. Relating to Grape
7 Street Crips 2, Dkt. 66.)

8 **II. FACTUAL BACKGROUND**

9 Defendant represented himself to his victims as an affiliate or
10 member of GSC to make them fear him so that they would continue
11 paying his extortion demands. According to victim Y.S., defendant
12 appeared to be using GSC members as his muscle to help him collect
13 extortion payments. Victims K.Y.J. and Y.K. likewise heard that
14 defendant was involved with a gang. Victims Y.S. and J.L., and
15 likely many others, also saw countless photographs on defendant's
16 Instagram more subtly referencing GSC with hand signs, terminology,
17 and clothing, among other references. (See Gov.'s Opp'n to Def.'s
18 Mot. in Limine to Exclude Evid. Relating to Grape Street Crips, Dkt.
19 70.)

20 **III. ARGUMENT**

21 Defendant has no constitutional right to refuse to permit
22 photographs to be taken of his tattoos. The Fifth Amendment
23 privilege against self-incrimination only protects an accused "from
24 being compelled to testify against himself or otherwise to
25 provide . . . evidence of a testimonial or communicative nature."
26 Schmerber v. California, 384 U.S. 757, 761 (1966). The compelled
27 display of "identifiable physical characteristics," however, is not
28 testimonial or communicative in nature, and therefore does not

1 infringe the privilege against self-incrimination. United States v.
2 Dionisio, 410 U.S. 1, 5-6 (1973). As the Supreme Court has
3 explained:

4 Both federal and state courts have usually held that [the
5 Fifth Amendment] offers no protection against compulsion to
6 submit to fingerprinting, photographing, or measurements,
7 to write or speak for identification, to appear in court,
8 to stand, to assume a stance, to walk, or to make a
9 particular gesture.

10 Schmerber, 384 U.S. at 764 (emphasis added); see also Gilbert v.
11 California, 388 U.S. 263, 266-67 (1967) ("The privilege [against
12 self-incrimination] reaches only compulsion of an accused's
13 communications, whatever form they might take . . . and not
14 compulsion of real or physical evidence A mere handwriting
15 exemplar, in contrast to the content of what is written, like the
16 voice or body itself, is an identifying characteristic outside [the
17 Fifth Amendment's] protection." (emphasis added; internal quotation
18 marks and citations omitted)). As Justice Holmes explained:

19 the prohibition of compelling a man to be witness against
20 himself is a prohibition of the use of physical or moral
21 compulsion to extort communications from him, not an
22 exclusion of his body when it may be material.

23 Holt v. United States, 218 U.S. 245, 252-53 (1910). Thus, courts
24 have routinely compelled an accused to provide fingerprints, blood
25 samples, voice exemplars, handwriting samples, to stand in a line-up,
26 to wear particular clothing, and to submit to photographs. See,
27 e.g., Dionisio, 410 U.S. 1 (voice exemplars); Gilbert, 388 U.S. 263
28 (handwriting exemplars); Schmerber, 384 U.S. 757 (blood samples);
United States v. Martinez, et al., CR 14-338(A)-SJO, Dkt. No. 2026

1 (order granting the government's request to photograph tattoos and
2 take fingerprints of defendants awaiting trial in a RICO matter).¹

3 With respect to tattoos, the Ninth Circuit has held that a
4 defendant may be compelled to display his hands with their
5 distinctive tattoos to the jury without subjecting himself to cross-
6 examination precisely because the display of tattoos is non-
7 testimonial and the government could compel it:

8 [A] display of hands is non-testimonial. This has been
9 repeatedly held in cases in which the government seeks to
10 compel a defendant to show various types of physical
11 characteristics to the jury. The cases hold that this does
12 not infringe the Fifth Amendment privilege against self-
13 incrimination.²

14 United States v. Bay, 762 F.2d 1314, 1315 (9th Cir. 1984) (citing
15 Dionisio, Schmerber, Holt, and United States v. Valenzuela, 722 F.2d
16 1431, 1433 (9th Cir. 1983)); see also Chavez v. Compton, 2010 WL
17 231359, at *2 (D. Mont. Jan. 20, 2010) (finding "no basis upon which
18 to bring a Fifth Amendment claim as the display of [the defendant's]
19 tattoos were non-testimonial"); Free v. Culliver, 2007 WL 2069841, at
20 *11 (M.D. Ala. Jul. 17, 2007) (same).

21 Indeed, courts in this district have routinely granted the
22 government's motion to take photographs of defendants' tattoos in
23 racketeering cases based on the reasons set forth in this
24 application. See, e.g., United States v. Rios, No. 2:22-CR-00020-PA,

25 ¹ While the grand jury could have subpoenaed the photographs,
26 fingerprints, handwriting exemplars and the like, these items are
27 often obtained by means of court order before trial. See, e.g.,
28 United States v. Lincoln, 494 F.2d 833, 836, 838-39 (9th Cir. 1974)
(affirming compulsion of handwriting exemplars shortly before trial).

² Nor would it violate defendant's Fourth Amendment rights. See
Dionisio, 410 U.S. at 8-16 (compelling voice exemplars does not
violate Fourth Amendment); United States v. Mara, 410 U.S. 19, 21-22
(1973) (same for handwriting exemplars).

1 Dkt. 281 (July 7, 2023); United States v. Loza, No. 2:16-CR-00390-
2 DSF, Dkt. 3749 (Jan. 17, 2020); United States v. Loza, No. 2:16-CR-
3 00390-PA, Dkt. 2146 (Oct. 1, 2018). Given the disputed issues in
4 defendant's trial, he should be ordered to do the same.

5 **IV. CONCLUSION**

6 For the forgoing reasons, defendant should be ordered to permit
7 government agents or BOP staff to take photographs of any and all
8 tattoos on his body.

DECLARATION OF JENA A. MACCABE

I, Jena A. MacCabe, declare as follows:

1. I am an Assistant United States Attorney for the Central District of California and am one of the attorneys responsible for prosecuting the case of United States v. Daekun Cho, CR 23-00149-FLA.

2. On March 8, 2024, I communicated with defense counsel via email and informed them that the government would file an ex parte application for an order compelling defendant to allow photographs of his tattoos. Counsel said they do not oppose provided that the photographer capture all tattoos and body parts, besides intimate body parts. The government will ask the photographer to do so.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed at Los Angeles, California, on March 8, 2024.

/s/

JENA A. MACCABE